YPJE CONSULTANCY SERVICE SDN. BHD.

v.

HELLER FACTORING (M) SDN. BHD. (FORMERLY KNOWN AS MATANG FACTORING SDN. BHD.)

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' MAHADEV SHANKAR JCA
DATO' AHMAD FAIRUZ SHEIKH ABDUL HALIM JCA
[RAYUAN SIVIL NO. B-02-820-95]
19 MARCH 1996

COMPANY LAW: *Winding-up - Notice under s. 218 Companies Act 1965 - Notice of demand did not quantify interest payable on principal amount - Principal amount exceeded RM500 - Whether notice of demand defective - Affidavit verifying petition and petition itself bearing same date - Whether r. 26 Companies Winding-Up Rules infringed - Whether company unable to pay its debts.*

Judgment in default had been obtained against the appellant company. Thereafter the respondent served a notice under s. 218 of the Companies Act 1965 on the appellant. The payment as required in the notice was not made by the appellant. A winding-up petition was filed against the appellant. The High Court in Shah Alam dismissed the preliminary objections of the appellant and ordered winding-up of the appellant company. The appellant appealed.

The appellant's Counsel submitted two grounds why the petition should have been dismissed, *viz.:*

(a) the interest on the principal amount had not been quantified in the notice of demand. The notice therefore was defective and not valid in law. Consequently the presumption that the appellant was unable to pay off the debt did not arise.

(b) the respondent had contravened r. 26 of the Companies Winding-Up Rules in that the affidavit verifying the petition and the petition itself bore the same date. The respondent's petition consequently was totally defective.

Held:

Per Ahmad Fairuz Sheikh Abdul Halim JCA (delivering the judgment of the Court):

[1] This appeal was concerned with s. 218(1)(e) and s. 218(2)(a) of the Companies Act 1965. The provisions show clearly that the provisions of Bankruptcy laws are different from the provisions of the Companies Act referred to. Section 3(1)(i) of the Bankruptcy Act 1967 contains, among

other things, the requirement of the interest to be quantified as of the date of the issue of the bankruptcy notice. Hence, the authorities from the bankruptcy cases *Lim Tok Chiow & Anor. v. Dian Tong Credit & Development Sdn. Bhd.* [1994] 2 MLJ 345, *Fawzia bt Osman v. Bank Bumiputra Malaysia Berhad & Another Appeal* [1991] 1 MLJ 426, *Ghazali b. Mat Noor v. Southern Bank Bhd. & 4 Other Appeals* [1989] 2 MLJ 142 and *Low Mun v. Chung Khiaw Bank Ltd.* [1988] 1 MLJ 263 were not applicable to the issues in this appeal.

[2] In this appeal, the notice of demand showed that the total principal amount owing far exceeded the quantum of RM500. Applying the reasoning in *The Oriental Bank Bhd. v. CSJ Pengangkutan Sdn. Bhd.* [1989] 2 CLJ 1076, *Re Tweeds Garages Ltd.* [1962] Ch. 406, *Commonwealth Bank of Australia v. Individual Homes Pty. Ltd.* (119, ACTR, 1) and *Dikwa Holidays Pty. Ltd. v. Oakbury Pty. Ltd.* [1992] 8 ACSR 53 the point that since the interest on the principal amount had not been quantified the notice of demand was defective could not be sustained.

[3] In this appeal both the affidavit verifying the petition and the petition contained the date of 10 July 1995. Since the affidavit itself stated that the petition was attached to the affidavit, the affidavit must have been made after the petition was presented. Further because the affidavit verifying the petition had been filed on 11 July 1995 r. 26 had not been infringed. Furthermore there was no evidence that the affidavit had been sworn before the petition was presented.

[4] The principle on technicality in the system of justice is that "Any system which by giving effect to the form and not to the substance defeats substantive rights and is defective to that extent. The ideal must always be a system that gives to every person what is his" (per Kaikus J in *Imtiaz Ahmad v. Ghulam Ali* PLD 1963 SC 382 at p. 400)

[Appeal dismissed with costs]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG SYARIKAT:** Penggulungan - Notis di bawah s. 218 Akta Syarikat 1965 - Notis tuntutan tidak mewajarkan faedah yang kena dibayar ke atas jumlah utama - Jumlah utama melebihi RM500 - Samada Notis Tuntutan tidak sempurna - Afidavit menentusahkan petisyen dan petisyen sendiri mempunyai tarikh yang sama - Samada k. 26 Kaedah-kaedah Penggulungan Syarikat dilanggari - Samada syarikat tidak dapat membayar hutangnya.*

Penghakiman ingkar telah diperolehi terhadap syarikat perayu. Selepas itu responden telah menyampaikan notis di bawah s. 218 Akta Syarikat 1965 ke atas perayu. Pembayaran sepertimana yang dikehendaki oleh notis tersebut telah

tidak dibuat oleh perayu. Satu petisyen penggulungan telah difailkan terhadap perayu tersebut. Mahkamah Tinggi di Shah Alam telah menolak bantahan-bantahan awal perayu dan memerintahkan penggulungan syarikat perayu. Perayu telah merayu.

Peguam bagi pihak perayu telah mengemukakan dua alasan mengapa petisyen tersebut seharusnya ditolak, iaitu:

(a) faedah ke atas jumlah utama belum dihitungkan dalam notis tuntutan tersebut. Notis tersebut dengan itu tidak sempurna dan tidak sah di sisi undang-undang. Berikutan itu tanggapan bahawa perayu tidak dapat membayar hutang tidak berbangkit.

(b) responden telah melanggari k. 26 Kaedah-kaedah Penggulungan Syarikat, iaitu afidavit menentusahkan petisyen dan petisyen itu sendiri mempunyai tarikh yang sama. Petisyen responden berikutan itu adalah sesungguhnya tidak sempurna.

Diputuskan:

[1] Rayuan ini adalah berkaitan dengan s. 218(1)(e) dan s. 218(2)(a) Akta Syarikat 1965. Peruntukan-peruntukan tersebut jelas menunjukkan bahawa peruntukan-peruntukan undang-undang kebankrapan adalah berbeza daripada peruntukan-peruntukan Akta Syarikat yang dirujuk. Seksyen 3(1)(i) Akta Kebankrapan 1967 mengandungi, antara lainnya, kehendak supaya faedah dihitung sepertimana pada tarikh pengeluaran notis kebankrapan tersebut. Dengan itu, autoriti-autoriti daripada kes-kes kebankrapan *Lim Tok Chiow & Anor. v. Dian Tong Credit & Development Sdn. Bhd.* [1994] 2 MLJ 345, *Fawzia bt Osman v. Bank Bumiputra Malaysia Berhad & Another Appeal* [1991] 1 MLJ 426, *Ghazali b. Mat Noor v. Southern Bank Berhad & 4 Other Appeals* [1989] 2 MLJ 142 and *Low Mun v. Chung Khiaw Bank Ltd.* [1988] 1 MLJ 263 tidak terpakai kepada isu-isu dalam rayuan ini.

[2] Dalam rayuan ini, notis tuntutan menunjukkan bahawa jumlah utama terhutang jauh melebihi perhitungan sebanyak RM500. Memakai alasan dalam *The Oriental Bank Bhd. v. CSJ Pengangkutan Sdn. Bhd.* [1989] 2 CLJ 1076, *Re Tweeds Garages Ltd.* [1962] Ch. 406, *Commonwealth Bank of Australia v. Individual Homes Pty. Ltd.* (119, ACTR, 1) dan *Dikwa Holidays Pty. Ltd. v. Oakbury Pty. Ltd.* [1992] 8 ACSR 53 hal perkara bahawa oleh kerana faedah ke atas jumlah utama tersebut belum dihitung maka notis tuntutan tersebut menjadi tidak sempurna tidak dapat dipertahankan.

[3] Dalam rayuan ini kedua-dua afidavit menentusahkan petisyen dan petisyen mengandungi tarikh 10 Julai 1995. Oleh kerana afidavit tersebut dengan sendirinya menyatakan bahawa petisyen tersebut telah dilampirkan pada

afidavit itu, maka afidavit tersebut tentunya telah dibuat selepas petisyen dikemukakan. Selanjutnya, oleh kerana afidavit yang menentusahkan petisyen tersebut telah difailkan pada 11 Julai 1995 k. 26 telah tidak dilanggari. Seterusnya, tidak terdapat keterangan bahawa afidavit tersebut telah diikrarkan sebelum petisyen dikemukakan.

[4] Prinsip teknik dalam sistem keadilan adalah bahawa "Any system which by giving effect to the form and not to the substance defeats substantive rights and is defective to that extent. The ideal must always be a system that gives to every person what is his" (per Kaikus J dalam *Imtiaz Ahmad v. Ghulam Ali* PLD 1963 SC 382 at p. 400).

[Rayuan ditolak dengan kos]

Cases referrred to:

The Oriental Bank Bhd. v. CSJ Pengangkutan Sdn. Bhd. (Formerly known as Syarikat Pengangkutan Chua Seng Joo Sdn. Bhd.) [1989] (2) CLJ 1076 ***(foll)***

Re: Tweeds Garages Ltd. [1962] Ch. 406 ***(foll)***

Commonwealth Bank of Australia v. Individual Homes Pty. Ltd. (119, ACTR, 1) ***(foll)***

Dikwa Holdings Pty. Ltd. v. Oakbury Pty. Ltd [1992] 8 ACSR 53 ***(foll)***

Processed Sand Pty. Ltd. v. Thiess Contractors Pty. Ltd. [1983] (1) ACLC 1069; 7 ACLR 956 ***(refd)***

Re Willes Trading (1977-78 ACLC 434) ***(refd)***

Re Bryant Investment Co. Ltd. (1974 (1) WLR 826) ***(refd)***

Pro Image Productions (Vic) Pty. Ltd. Catalyst Television [1988] (6) ACLC 888 ***(refd)***

Re Fabo Pty. Ltd. [1989] (7) ACLC 19 ***(foll)***

Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] (2) MLJ 173 ***(dist)***

Sobri bin Arshad v. Associated Tractors Sdn. Bhd. [1991] (1) CLJ 798 ***(dist)***

Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382 ***(cit)***

Lim Tok Chiow & Anor. v. Dian Tong Credit & Development Sdn. Bhd. [1994] 2 MLJ 345 ***(not foll)***

Fawzia bt Osman v. Bank Bumiputra Malaysia Berhad & Another Appeal [1991] 1 MLJ 426 ***(not foll)***

Ghazali b. Mat Noor v. Southern Bank Bhd. & 4 Other Appeals [1989] 2 MLJ 142 ***(not foll)***

Low Mun v. Chung Khiaw Bank Ltd. [1988] 1 MLJ 263 ***(not foll)***

Re Perusahaan Jenwatt Sdn. Bhd. [1990] 2 MLJ 178 ***(refd)***

Re Yap Kim Kee & Sons Sdn. Bhd. [1990] 2 MLJ 108 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i)

Comapanies Act 1965 ss. 218(1)(a), (e), 460(2)(a)

Other sources referred to:

The Law Of Company Liquidation, J. O'Donovan

For the appellant - S. Selvarajah; M/s. Azariah & Assoc.

For the respondent - Gregory Chan (Diljit Kaur with him); M/s. K.C. Yap Kamaludin & Partners

JUDGMENT

Ahmad Fairuz Sheikh Abdul Halim JCA:

This is an appeal against the decision of the High Court of Shah Alam which had dismissed the preliminary objection of the appellant and ordered that the appellant's company be wound up. We had, on 26 February 1996, heard this appeal and decided to dismiss the appeal with costs without calling upon Counsel for the respondent to address us.

This appeal emanates from a Company's Winding-Up Petition No. 28-58-95 against the appellant. According to this petition a judgment in default dated 15 June 1993 had been obtained against the appellant. Consequent to this the respondent had served a notice under s. 218 of the Companies Act 1965 on the appellant. The payment as required in the notice was not made by the appellant. As such the appellant was deemed unable to pay the debt. Hence paragraph 8 of the petition contends that the winding-up of the appellant was just and equitable.

Appellant's Counsel submitted two grounds why the petition should have been dismissed. They are:

(a) The interest on the principal amount had not been quantified in the notice of demand. The notice therefore is defective and not valid in law. Consequently the presumption that the appellant was unable to pay off the debt does not arise. On this ground, the petition of the respondent should have been dismissed - (paragraph 4 under the title "s. 218(2)(a) Akta Syarikat 1965" in the summary of submission of the learned Counsel for the appellant).

(b) The respondent had contravened r. 26 of the Companies Winding-Up Rules. The respondent's petition consequently "is totally defective and should have been dismissed" - (paragraph 4 in the last page of the summary of submission of the learned Counsel for the appellant)

To support his contention in paragraph 3(a) above, the appellant relied on the following cases:

(i) *Lim Tok Chiow & Anor. v. Dian Tong Credit & Development Sdn. Bhd.* [1994 (2) MLJ, 345];

(ii) *Fawzia bt. Osman v. Bank Bumiputra Malaysia Berhad & Another Appeal* [1991 (1) MLJ, 426];

(iii) *Ghazali b. Mat Noor v. Southern Bank Bhd. & 4 Other Appeals* [1989 (2) MLJ, 142]; and

(iv) *Low Mun v. Chung Khiaw Bank Ltd.* [1988 (1) MLJ, 263].

In the case of *Lim Tok Chiow v. Dian Tong Credit & Development Sdn. Bhd.,* (paragraph 4(i) above), the notice under s. 218 Companies Act has been cited in full at p. 348 and 349 (in 1994 Vol. 2 MLJ). Similar to the notice in this appeal, the notice, among other things, specified the interest at the rate of 12% per year (8% in this appeal) on the principal sum with effect from a date (which is specified) up to the date of full and final settlement (full settlement in this appeal). The notice in the case of *Lim Tok Chiow* is as follows:

> Take notice that you are now required to pay to us as solicitor for Lim Tok Chiow and Chong Nyuk Lan (f), both of Lot 8346, 1st Floor, Section 64, Jalan Sungei Sekama, Off Jalan Padungan, 93100 Kuching, Sarawak, the following:
>
> (i) the principal sum of RM107,975;
>
> (ii) the sum of RM14,800 being interest calculated as at 15 February 1990;
>
> (iii) interest at 12% p.a. on the sum of RM147,500 from 15 February 1990 to 28 February 1990 then thereafter at the rate of 12% p.a. on the principal sum of RM107,975 from 29 February 1990 till full and final settlement;
>
> (iv) costs of RM225
>
> being the balance of the outstanding amount due under a judgment in default of appearance of the High Court in the above-mentioned suit within twenty-one (21) days from the date of the receipt of this notice, failing which you shall be deemed to be unable to pay your debts and appropriate action will be taken for the winding up of Dian Tong Credit & development Sdn. Bhd.
>
> Dated: 20 December 1991.
>
> -sgd-
>
> Messr. Ibrahim & Co.
> Solicitors for the judgment creditor,
> Lim Tok Chiow and Chong Nyuk Lan (f)
> whose address for service is at No. 39
> Jalan P. Ramlee (1st Floor), Kuching, Sarawak.

The notice in this appeal reads as follows:

Notice

Pursuant To S. 218 Of the Companies Act 1965

To: YPJE Consultancy Service Sdn. Bhd.
11-2 The Highway Centre
Jalan 51/205
46050 Petaling Jaya
Selangor Darul Ehsan

Re: High Court at Shah Alam
C.S. No. 22-145-1993
Heller Factoring (M) Sdn. Bhd.
v.
YPJE Consultancy Service Sdn. Bhd.

Take Notice that you are hereby required to pay to us as solicitors for Heller Factoring (M) Sdn. Bhd. (formerly known as Matang Factoring Sdn. Bhd.) of Suite 1108 (11F), Wisma HLA, Jalan Raja Chulan, 50200 Kuala Lumpur, the outstanding sum of RM391,069.19, as at 31st December 1992 together with interest thereon at the rate of 8% per annum from 1st January 1993 to date of full settlement and costs of RM225 within **Twenty-One (21)** days from the date of service of this Notice, failing which you will be deemed to be unable to pay the aforesaid debt and appropriate action will be taken for the winding-up of YPJE Consultancy Service Sdn. Bhd.

Dated the 15th day of March 1995.

-sgd-

Messrs K.C. Yap Kamaludin & Partners
Advocates & Solicitors
Suite 12A. 03-05, Level 12A
IGB Plaza, Jalan Kampar
Off Jalan Tun Razak
50400 Kuala Lumpur

When commenting on paragraph (iii) of the notice in the case of *Lim Tok Chiow,* the learned Judge emphasised that the sum had not been quantified and the quantum that should be paid had been left for the respondent's company to calculate. The learned Judge also referred to the right of the petitioner in the judgment in default to be paid the interest at the rate specified in the notice until there has been a full and final settlement. It was also stressed that the Court must, at the time the petition was filed, be able to know the quantum of the debt which the respondent's company was alleged to be unable to pay (after 3 weeks from the date of the service of the notice of demand under s. 218(2)(a) Companies Act) so that the presumption of the respondent's company being unable to pay its debt can be invoked. The learned Judge also stated that the amount of the interest in paragraph (iii) could with ease be quantified by the petitioner at the time that the notice of demand was being issued but the petitioner however did not do so. The learned Judge further admitted that the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 are not directly applicable in cases of winding up companies. However, the learned Judge was of the view that the analogy "obtained from the authorities in bankruptcy cases must equally apply in companies' winding-up cases as the consequences of the order made by the Court in both the cases are the same". Based on this premise the learned Judge came to the view that the notice of demand was defective because of the failure to quantify and consequently the presumption that the respondent's company was unable to pay its debts cannot

arise. At this stage it may be relevant to remember that the interest mentioned in paragraph (iii) is of a quantum which is arrived at after calculating on the basis of its percentage with effect from 29 February 1990 up to the date of the settlement of the principal sum - which date, according to the learned Judge, was known to the respondent's company. The learned Judge however did not refer to any specific case laws to support his conclusion other than the references to the authorities in bankruptcy cases (which was mentioned in passing). As to the bankruptcy cases, I have examined the cases mentioned in paragraph 4(ii) to (iv) above. It is obvious that all these 3 cases involve s. 3(1)(i) of the Bankruptcy Act 1967 which reads:

> 3(1) A debtor commits an Act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the Court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum with the terms of the judgment or order **with interest quantified up to the date of issue of the bankruptcy notice,** or to secure or compound for it to the satisfaction of the creditor or the Court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> Provided that for the purpose of this paragraph and of s. 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

This appeal is concerned with s. 218(1)(e) of the Companies Act which reads:

> 218(1) the Court may order the winding-up if:
>
> (e) the company is unable to pay its debts;

and s. 218(2)(a) of the Companies Act 1965 which reads as follows:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three

> weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction or the creditor;

The provisions show clearly that the provisions of the Bankruptcy laws are clearly different from the provisions of the Companies Act referred to above. Section 3(1)(i) contained, among other things, the requirements of the interest to be quantified as of the date of the issue of the bankruptcy notice. Hence, I respectfully am of the view that the authorities from the bankruptcy cases are not applicable to the issue in this appeal.

This issue of failure to quantify the amount was also discussed by the learned Dzaiddin J (as he then was) in the case of *The Oriental Bank Bhd. v. CSJ Pengangkutan Sdn. Bhd. (Formerly knows as Syarikat Pengangkutan Chua Seng Joo Sdn. Bhd.)* [1989 (2) CLJ, 1076). According to this case the failure to quantify the amount of interest does not bar the Court from issuing the winding-up order. The *Oriental Bank Bhd.* case also involved interest which had not been quantified. The learned Judge in that case had highlighted on the existence of the debt which exceeded RM2 million. The learned Judge also referred to the case of *Re Tweeds Garages Ltd.* [1962] Ch. 406 which is also a company's winding-up case. In that case the company that was to be wound up had admitted owing the petitioner but disputed the quantum of the debt which was specified in the petition. The learned Judge Plowman, in that case, stated that "where there is no doubt at all and there is none here that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, the dispute as to the precise sum which is owed to him is not by itself a sufficient answer to his petition".

In relation to this issue it is pertinent to consider s. 460(2)(a) Corporations Law in Australia which reads:

> For the purpose of an application that is made in relation to a company on the ground provided for by sub-section (1), the company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $1,000 then due has served on the company a demand, signed by or on behalf of the creditor, requiring the company to pay the sum so due and the company has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

It is obvious that this section is in *parimateria* with s. 218(2)(a) of our Companies Act. Hence, it is useful to refer to cases from Australia pertaining to this s. 460(2)(a). The case of *Commonwealth Bank of Australia v. Individual Homes Pty. Ltd.* (119, ACTR, 1) is one of them. Amongst the issues that arise in that case was whether the Court should dismiss the application for winding up because the amount which was demanded in the statutory demand was "incorrect or unclear". The learned Chief Justice Miles

in that case was satisfied that the debt involved exceeded $1,000. Concerning the matter of the amount being incorrect or unclear the learned Chief Justice referred to the case of *Dikwa Holdings Pty. Ltd. v. Oakbury Pty. Ltd.* [1992] 8 ACSR 53 (which involved a notice that stated a quantum in excess of the debt owed) and referred what Justice Wilcox said - that is "even if the notice over-stated the amount owing it is legitimate to look at the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debts". This, according to the Chief Justice, "must be the correct approach". After reviewing the evidence in the case the learned Chief Justice resolved that the company was unable to pay its debts and that on the balance of probabilities the debt involved exceeded $1,000. I am in full agreement with the rationale that has been expounded in the cases which had been referred to above. And in this appeal, the notice of demand showed that the total principal amount owing far exceeded the quantum of RM500. Applying the reasoning in the cases from Australia, *The Oriental Bank Bhd.* and *Re Tweeds Garages Ltd.*, I am of the view that the points raised in paragraph 3(a) could not be sustained.

Before I move to the second issue which was raised by the learned Counsel of the appellant I would like to refer to two other Malaysian cases which have been drawn to my attention by my learned brother, Gopal Sri Ram, JCA. I am indeed thankful to the learned Judge Gopal Sri Ram, my learned brother, for having drawn my attention to these two cases:

(a) *Re Perusahaan Jenwatt Sdn. Bhd.* [1990 (2) MLJ 178]; and

(b) *Re Yap Kim Kee & Sons Sdn. Bhd.* [1990 (2) MLJ, 108]

In both the cases, the amount stated in the relevant notice far exceeded the amount which was stated in the petition. The learned High Court Judge (as he was then) in the case of *Re Perusahaan Jenwatt Sdn. Bhd.* had referred to cases from Australia which enunicated contradictory principles on the same issues. The Judge however preferred to apply the principle laid down in the case of *Processed Sand Pty. Ltd. v. Thiess Contractors Pty. Ltd.* [1983 (1) ACLC 1069; 7 ACLR 956. Amongst other things, this case stated that "It would seem arbitrary and unjust to create an admission arising on failure to pay a debt, a part of which was not due". According to this case, the effect to such a provision (like s. 460(2)(a) cited in paragraph 8 above) is to invoke a statutory admission that a company is unable to pay its debt. The learned Waddel J in *Processed Sand Pty. Ltd.* said, "One would expect such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability". In the case of *Re Yap Kim Kee* the same learned High Court Judge (as he then was) decided that the relevant letter of demand was incorrect and because of that the company could not be presumed

to be unable to pay the debt. In reaching this conclusion the learned Judge was guided by the case of *Re Willes Trading* (1977-78 ACLC 434), *Re Bryant Investment Co. Ltd.* (1974 (1) WLR 826) and J.O 'Donovan's *"The Law Of Company Liquidation"*. It is obvious, from the judgment of the learned Judge in the case of *Re Yap Kim Kee,* that the rationale and approach of the learned Judge is about the same as that adopted by him in the case of *Re Perusahaan Jenwatt Sdn. Bhd.*. At this juncture it is important to remember that the literal approach adopted by the case of *Re Willes Trading* has not been agreed to by the Supreme Court of Victoria in the case of *Pro-Image Productions (Vic) Pty. Ltd. Catalyst Television* (1988 (6) ACLC 888). it is for this reason also that I am in agreement with the rationale propounded in the cases referred to in paragraph 8 above. To further strengthen my view (which disagrees with the literal interpretation approach) I am in agreement with the rationale found in the case of *Re Fabo Pty. Ltd.* (1989 (7) ACLC 19) which, among other things, emphasised that "the literal interpretation would compel the Court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed debt exceeding $1,000 has remained unpaid after making a proven demand without any reasonable explanation being advanced for this failure to do so ..." The Court in *Re Fabo Pty. Ltd.* went on to say, "By contrast the wider interpretation avoids such unfortunate consequences, is consistent with the legislative scheme underlying the provisions and permits the Court to make a winding up order where it is appropriate to do so".

Proceeding on to the second issue which was raised by the learned Counsel for the appellant i.e pertaining to the verifying affidavit and the petition respectively containing the same date. The Bundle of Authorities of the appellant discloses the r. 26 of the Companies (Winding-up) Rules and the cases of *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* (1978 (2) MLJ, 173) and the case of *Sobri bin Arshad v. Associated Tractors Sdn. Bhd.* (1991 (1) CLJ, 798). What is clear from these authorities is that the affidavit must be made in some cause or matter which is actually pending in the Court. Consequently, the affidavit which was sworn before the presentation of the petition would cause the petition to be void. In both the cases referred to by the learned Counsel for the appellant the affidavits were sworn before the petitions were presented. In the appeal before us both the affidavits and the petitions contained the date of 10 July 1995. The learned Trial Judge in his judgment stated that the affidavit referred to the petition which was attached thereto. The affidavit in this appeal itself stated that the petition was attached to the affidavit. Because of this the learned trial Judge said that the affidavit must have been after the petition was presented. The learned Trial Judge also said that because the affidavit that verifies the petition had been filed on 11 July 1995, the learned Judge was therefore of the opinion that r. 26 had not been infringed. With respect I agree with the learned trial Judge on this matter. Furthermore, there is no evidence to show that the affidavit had been sworn

before the petition was presented. On the basis of this rationale I am of the view that the authorities cited by the learned Counsel for the appellant are not applicable to the factual situation in this appeal.

What is obvious from the two issues raised by the learned Counsel for the appellant is that the issue are on matters of technicalities. On this the learned Kaikaus J said, "The English system of administration of justice on which our own is based, may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his". (*Imtiaz Ahmad v. Ghulam Ali* PLD 1963 SC 382 at page 400). Admittedly, what had been uttered by the learned Judge Kaikaus, pertains to or was in the context of civil procedure. But what is important is the principle on technicality in the system of justice. In this appeal, what has not been quantified is the interest on the principal amount. The question that arises is whether the petition should be dismissed merely on that ground, when it is clear that the principal amount stated in the notice has not been disputed and the quantum stated in the notice was a quantum which was far more than RM500. Similar issue arises concerning the verifying affidavit which contained the same date as that contained in the petition. Is it just that the petition be dismissed only for the reason that the date was one which was not dated after a date stated in the petition when it was clear from the affidavit that the affidavit refers to that petition itself. The substantive matter in this appeal is the capability of the appellant in paying its debts, and there was no evidence that had been forwarded that could show the capability of the respondent company in paying off its debts. Because of that I am respectfully of the view that this appeal should be dismissed with costs and the deposit to be given to the respondent to account of taxed costs. It must also be remembered that what occured in this appeal is that the quantum of the interest could be arrived at after a calculation is made and that the quantum does not inflate the debt to a figure that exceeds the total debt owed by the company as in the cases from Australia, *Re Tweeds Garages, Re Perusahaan Jenwatt Sdn. Bhd.* and *Re Yap Kim Kee and Sons Sdn. Bhd.* referred to above.

Mahadev Shankar JCA:

Saya telah membaca alasan penghakiman rakan sejawat saya Dato' Ahmad Fairuz bin Dato' Sheikh Abdul Halim dalam deraf.

Saya bersetuju sepenuhnya dengan alasan-alasan yang diberikan supaya rayuan ini ditolak.

Reported by Jasmesh Kaur